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In The

# Supreme Court of the United States

ROBERT WHITE AND OSCAR STILLEY,

*Petitioners,*

vs.

SHARON PRIEST, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, AND CHAIRMAN OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; MARK PRYOR, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF ARKANSAS; RAY THORNTON, IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS A JUSTICE OF THE ARKANSAS SUPREME COURT; ROBERT BROWN, TOM GLAZE, W. H. "DUB" ARNOLD, DONALD L. CORBIN, ANNABELLE CLINTON IMBER, AND JIM HANNAH, EACH IN THEIR INDIVIDUAL CAPACITIES, AND IN THEIR OFFICIAL CAPACITIES AS SITTING JUSTICES OF THE ARKANSAS SUPREME COURT; DICK BARCLAY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION; TIM LEATHERS, IN HIS OFFICIAL CAPACITY AS REVENUE COMMISSIONER AND DEPUTY DIRECTOR OF THE DEPARTMENT OF FINANCE AND ADMINISTRATION; JIMMIE LOU FISHER, IN HER OFFICIAL CAPACITY AS ARKANSAS STATE TREASURER; MR. EARNEST BROWN, MS. TONI PHILLIPS, MR. EARNEST E. EDWARDS, JR. MR. ROBERT CARRUTHERS, MRS. ANN BUSH, AND MARY SLINKARD, IN THEIR OFFICIAL CAPACITIES AS ELECTION COMMISSIONERS OF THE STATE OF ARKANSAS,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arkansas**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

1. May a state Supreme Court justice refuse to recuse from a case in which the justice has a direct, personal, substantial, pecuniary interest in reaching a conclusion against Petitioner, where a well established procedure exists to have impartial special justices appointed by the Governor of the state?

## PARTIES TO THE PROCEEDING

The caption contains the names of all parties in the case below, and also includes Oscar Stilley because the Arkansas Supreme Court concluded that he had violated Arkansas Rule of Appellate Procedure 11, and referred the matter to the Arkansas Committee on Professional Conduct for further action.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners Robert White and Oscar Stilley respectfully request that a writ of certiorari be issued to review the judgment of the Arkansas Supreme Court in this case.

## OPINIONS BELOW

The initial opinion of the Court was issued on April 10, 2002, dismissing most of the complaint. *White v. Priest*, 348 Ark. 135, 73 S.W.3d 572 (Ark. 2002) Motion for reinstatement of the complaint and renewed motion for recusal of the sitting Arkansas Supreme Court justices was timely made. The decision on this motion was rendered May 17, 2002, with Justice Brown dissenting. *White v. Priest*, 348 Ark. 783 (Ark. 2002). Justice Brown filed a supplemental dissenting opinion May 23, 2002. *White v. Priest*, ____ Ark. ____ (Ark. May 29, 2002)

## STATEMENT OF JURISDICTION

This case was required to be filed as an original action in the Arkansas Supreme Court, pursuant to Arkansas Constitution Amendment 7. The judgment of the Arkansas Supreme Court was entered on April 10, 2002. The Arkansas Supreme Court denied a timely motion for reinstatement of the complaint by a written opinion issued May 17, 2002.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US Constitution Amendment 5, providing that "No person shall . . . be deprived of life, liberty, or property without due process of law. . . . "

US Constitution Amendment 14, providing that "Nor shall any state deprive any person of life, liberty, or property, without due process of law. . . . "

## STATEMENT OF THE CASE

The law of Arkansas allows citizens to change the law by way of the initiative petition process. On statewide issues, the proponents of such issues must first obtain the approval of the Attorney General and the Secretary of State with respect to the ballot title and popular name proposed by the sponsor of the amendment. The Attorney General may 1) approve the ballot title and popular name as submitted, or 2) make corrections to the ballot title and popular name as he deems necessary, or 3) reject the ballot title and popular name for specified reasons and direct the sponsor to redraft the amendment.

If the ballot title and popular name are approved, any citizen of the state is entitled to bring an original action in the Arkansas Supreme Court, to obtain declaratory relief. If the ballot title and popular name are rejected or if no action is taken, any sponsor of the amendment may sue to compel the Attorney General to perform his duty of review, and to certify the amendment if the ballot title and popular name are adequate.

On March 26, 2002, Petitioners filed an original action in the Arkansas Supreme Court, seeking among other things review of five proposed amendments to the Arkansas Constitution. Two had been certified by the Secretary of State and Attorney General for the collection of signatures for possible presentation to the voters in 2002. One had to do with prison reform, the other provided a salary limitation of $100,000 per year for employees of the state of Arkansas. Two had been rejected by the Attorney General for perceived errors in the ballot title, which the Attorney General declined to correct.

The last amendment was one assigned the number "Amendment 4" for the year 2000, which would have abolished the Arkansas sales and use tax on used cars. Due to the decision in *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000), Amendment 4 had not been given effect despite the fact that the amendment actually appeared on the ballot, and was approved by approximately 60% of the voters, according to vote tallies from the approximately 60% of Arkansas precincts that counted the vote on Amendment 4.

The salary limitation amendment would have reduced the salary of the judges of the Arkansas Supreme Court by approximately $20,000 annually. In addition, Count 4 of the complaint sought a refund of moneys alleged to have been illegally taken by the justices of the Arkansas Supreme Court.

The theory by which the Arkansas Supreme Court justices are claimed to be liable for repayment of salary is as follows. The Arkansas Supreme Court in *Kurrus v. Priest* had declared a tax reduction unlawful on the principle ground that this tax reduction might violate an

existing substantive provision of the Arkansas Constitution.

Arkansas Constitution Amendment 9 prohibits the justices of the Supreme Court from receiving compensation greater than that authorized at the beginning of the term to which the justice was elected. The language of Amendment 43 permits the increase of salaries of justices of the Supreme Court during the term for which the justice has been elected.

Petitioners Robert White, employing Oscar Stilley as counsel, asked the Court to either declare its own annual salary increases illegal and subject to repayment, or else to enroll Amendment 4 of 2000 as law. In essence, Petitioners requested that the Arkansas Supreme Court choose between the two rules of law set forth below:

> 1) A proposed amendment to the Arkansas Constitution which contradicts a prior provision of the Arkansas Constitution is thus void or voidable, or;
>
> 2) An amendment to the Arkansas Constitution overrules any prior substantive provision of the Arkansas Constitution which may conflict with the proposed Amendment.

Petitioners filed a motion for recusal with the complaint, and served the justices with the complaint, summons, and motion for recusal.

The Arkansas Supreme Court denied the motion for recusal and dismissed the complaint against themselves prior to the time for filing of an answer. The requests for judicial review of the actions of the Attorney General were rejected, except as to the request for review of the ballot

titles and popular names already approved by the Attorney General and Secretary of State. A hearing on those issues was set so late that it would have been impossible for Petitioners to have collected the requisite signatures after a decision by the Arkansas Supreme Court, even if the ballot titles and popular names were approved from the bench. When all other avenues for judicial relief had been exhausted, Petitioners dismissed the remaining request for declaratory judgment, without prejudice to petition this Court for certiorari.

In addition, a show cause order was entered on April 10, 2002, directing Oscar Stilley to show cause within 7 days as to why he should not be sanctioned under Arkansas Rule of Appellate Procedure (ARAP) 11, which prohibits frivolous appeals.

At this time the Petitioners raised the US Constitutional arguments that are the subject of this petition for certiorari. Believing that recusal was inescapable, Petitioners in his original motion for recusal had simply cited recent Arkansas caselaw indicating that recusal was required, and that the justices would in fact recuse in cases such as this.

However, Arkansas caselaw is very explicit in saying that a litigant has a right to move for recusal for purposes of considering a motion for rehearing and reconsideration, whether or not a prior motion for recusal has been made or denied.

Petitioners had in his original complaint sought review of a rule created by the decisional law of the Arkansas Supreme Court, creating such a harsh test of citizen initiated ballot titles that a very high percentage of such ballot titles are rejected at the last minute, and

creating such a lenient rule for the ballot titles of the General Assembly that no ballot title has ever failed the test. See Kennedy, *Initiated Constitutional Amendments In Arkansas: Strolling Through the Mine Field*, 9 UALR L.J. 1, 23 (1986-87).

The Arkansas Supreme Court had refused to consider the constitutionality of this rule in *Kurrus v. Priest*. The Arkansas Supreme Court, using the harsh test for citizen initiatives, had in a 4-3 decision ruled that the ballot title supplied an alternative basis for rejecting Amendment 4 of 2000.

Petitioners would be most happy to allow this most august tribunal to consider this US 1st Amendment question. Petitioners also recognize the enormous responsibilities of this Court and the great demands on the Court's time. In deference to the time of the Court, unquestionably a most precious commodity, Petitioners have sought only a determination of whether or not Petitioners were entitled to have the issues raised in his original action complaint decided by a tribunal consisting of impartial and disinterested justices. If this relief is granted, then an Arkansas Supreme Court composed of special justices will be able to consider the 1st Amendment issues, and other issues raised in the case.

Petitioners filed a 70 page motion for reconsideration within the 7 day period, showing that Rule 11 was not violated, requesting the court to reconsider and rehear the dismissed counts of the Complaint. Petitioners moved for recusal of the justices for the consideration of the issue of sanctions as well as the request for rehearing and reconsideration of the dismissal of the complaint.

Six of the Arkansas Supreme Court justices declined to recuse and struck the entire 70 page pleading from the record for "intemperate and distasteful language."[1] Justice Brown, the lone dissenter, opined that all the sitting justices had a conflict of interest and a duty to recuse. He also stated that Petitioners were entitled to oral argument on his motion for recusal, pursuant to the rules of the court.

The court ruled that counsel for Petitioners, Oscar Stilley, had violated ARAP 11. The Arkansas Supreme Court referred Stilley to their Committee on Professional Conduct, which has filed and served a complaint against Oscar Stilley.

Robert White petitions this Court *pro se* for certiorari on the question of whether or not he is entitled to have his case heard by justices who do not have a direct, personal, substantial pecuniary interest in the subject matter of the litigation. Oscar Stilley petitions for certiorari *pro se* seeking an order from this Court directing a new hearing before a disinterested panel on the question of violation of Rule 11.

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[1] Counsel for Petitioners, Oscar Stilley, asked for additional time but was denied same. At the end of the brief, Petitioners made the statement "Due to the short time frame of the preparation of this brief, and the lack of definition by the Court of the charges to be met, there are some errors and statements or formatting that would be more polished if more time were available. Undersigned counsel prays the Court's indulgence and forgiveness in this regard."

There was no intent to offend the Arkansas Supreme Court or any of its members, but apparently offense was taken, for which Petitioners would profusely apologize.

## REASONS FOR GRANTING THE WRIT

### Procedural Background

Arkansas Constitution Amendment 7 provides that "The sufficiency of all State-wide petitions shall be . . . subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes." *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996)

Judicial relief was therefore available solely at the Arkansas Supreme Court. Unless this Court intervenes, the Arkansas Supreme Court will be the court of first and last resort in this case. In *Forrester v. White*, 484 U.S. 219, 227 (1988), this Court, in explaining the rationale for judicial immunity, said "Most judicial mistakes or wrongs are open to correction through ordinary mechanisms of review. . . . "

The Arkansas Supreme Court was divided 6-1 on whether or not Petitioners would be entitled to disinterested justices. Justice Brown, in his dissent, stated that he believed Petitioners were entitled to disinterested justices, and should have been allowed the customary 5 minutes oral argument, saying that "An opportunity to be heard on this matter is fundamental due process." (Appendix page 22) Justice Brown recused from the case in its entirety, by supplemental opinion. (Appendix page 14)

Petitioners would most respectfully request the issuance of the writ to resolve this conflict.

**Due process is violated when a judicial officer presides over a case, alone or with others, where the judicial officer has an interest in the outcome.**

In the case *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), this Court opined as follows:

> A fair trial in a fair tribunal is a basic requirement of due process. **Fairness of course requires an absence of actual bias in the trial of cases**. But our system of law has always endeavored to prevent even the probability of unfairness. **To this end *no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.*** That interest cannot he defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Tumey v. State of Ohio*, 273, U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who could do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." (Citation omitted).

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, at 821 (1986), the Court said:

> The record in this case presents more than mere allegations of bias and prejudice, however. Appellant also presses a claim that Justice Embry had a more direct stake in the outcome of this case.

In *Tumey*, while recognizing that the Constitution does not reach every issue of judicial qualification, the Court concluded that "it ***certainly violates*** the Fourteenth Amendment . . . ***to subject [a person's]*** liberty or ***property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case***." 273 U.S., at 523.

More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with precision." *Ibid.* Nonetheless, a reasonable formulation of the issue is whether the

> "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Ward v. Village of Monroeville*, supra, at 60.

Under these prior holdings, we examine just what factors might constitute such an interest in the outcome of this case that would bear on recusal. At the time Justice Embry cast the deciding vote and authored the court's opinion, he had pending at least one very similar bad-faith-refusal-to-pay lawsuit against Blue Cross in another Alabama court. The decisions of the court on which Justice Embry sat, the Alabama Supreme Court, are binding on all Alabama courts.

> We need not blind ourselves to the fact that the law in the area of bad-faith-refusal-to-pay claims in Alabama, as in many other jurisdictions, **was unsettled at that time**, as the court's close division in deciding this case indicates. When Justice Embry cast the deciding vote, **he did not merely apply well-established law** and **in fact quite possibly made new law; the court's opinion does not suggest that its conclusion was compelled by earlier decisions**. Instead, to decide the case the court stated that "it is first necessary to review the policy considerations, elements, and instructive guide posts set out by this court in earlier case law." 470 So.2d, at 1070. And in another case the court acknowledged that "the tort of bad faith refusal to pay a valid insurance claim is in the embryonic stage, and the Court has not had occasion to address every issue that might arise in these cases." *National Savings Life Ins. Co. v. Dutton*, 419 So.2d, at 1362.
>
> (Emphasis added) (footnote omitted).

It is uncontrovertible that in this case the Arkansas Supreme Court was asked to make new law. Under the rule laid down in *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000), a proposed amendment to the Arkansas Constitution would be invalid if it contradicted a substantive provision of the same constitution. While everyone agrees that the procedural rules for amending the constitution must be respected in order to have a valid amendment for the consideration of the people, the idea that an amendment cannot overrule prior substantive law, even with a general repealer clause, is a novel one.

The Arkansas Supreme Court had the option of overruling *Kurrus v. Priest*, to save Amendment 43, thus saving themselves tens of thousands of dollars each, at the expense of the public treasury. They also had the option of upholding the principle in *Kurrus*, by declaring Amendment 43 void for violation of Amendment 9. This would have imposed a huge financial burden upon themselves, and further would have cast doubt on the validity of many provisions of the Arkansas Constitution.

In its original decision the Arkansas Supreme Court denied that it had jurisdiction over the request to recover the illegal exactions that they had received, even though the complaint plainly sought relief that is, pursuant to Amendment 7 of the Arkansas Constitution, cognizable only as an original action in the Arkansas Supreme Court. Arkansas Constitution Amendment 7 provides in pertinent part:

> Sufficiency – The sufficiency of all State-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes.

This constitutional amendment is implemented by Supreme Court Rule 6-5, which provides:

> Original actions.
>
> (a) Original jurisdiction. The Supreme Court shall have original jurisdiction in extraordinary actions as required by law, such as suits attacking the validity of statewide petitions filed under Amendment 7 of the Arkansas Constitution, or where the Supreme Court's contempt powers are at issue.

It is important to note that the original decision of the Arkansas Supreme Court came "out of the blue" without notice or opportunity to brief the court on the issues of the case. Upon motion for rehearing and reconsideration, Petitioners argued and demonstrated that the court had original jurisdiction over the case, at minimum for the purpose of deciding the validity of Amendment 43.

The Arkansas Supreme Court, in its decision, said that "we would merely observe at this point that the Publishers Notes to Amendment 43 suggest Amendment 43 probably supersedes Amendment 9." (Appendix page 9) This would seem to demonstrate that a justiciable contention had been raised, which should have been decided by the court, properly constituted. If the publisher thought that Amendment 43 "probably" supersedes Amendment 9, it is fair to assume that there is also the possibility that Amendment 43 does not supersede Amendment 9.

In just 7 days, Petitioners prepared and filed a 70 page brief demonstrating the merit of their claims. The Arkansas Supreme Court, with one dissent, simply struck the entire brief of Petitioners and refused to consider any of their arguments.

Therefore, we now have a situation very similar to that in *Aetna Life Insurance Company*. The Arkansas Supreme Court has stricken the brief and refused to consider questions which necessarily would have made new law, although the sitting justices had a direct, personal substantial financial incentive to decide the law in a manner adverse to the taxpayers. In this manner they have effectively insulated themselves from the consequences logically demanded by their own decisions.

**The "Rule of Necessity" applies *only* where a recusal would destroy the ability of the tribunal to function.**

In both decisions the Arkansas Supreme Court cited the rule of necessity as its basis for declining to recuse. On request for rehearing and reconsideration, however, Justice Brown recused. (Appendix pages 14, 21) He cited Arkansas Constitution Amendment 80, which recently amended our State Constitution with a new Judicial Article to include the following language:

> No Justice or Judge shall preside or participate in any case in which he or she might be interested in the outcome, in which any party is related to him or her by consanguinity or affinity within such degree as prescribed by law, or in which he or she may have been counsel or have presided in any inferior court.

The most important recent federal case on the Rule of Necessity is *United States v. Will*, 449 U.S. 200 (1980). There, the US Supreme Court recited the general principal of the Rule of Necessity for the past five and a half centuries, which states that recusal is not required if recusal would destroy the ability of the tribunal to function, thus depriving the litigants of their rights under the law. The Court said:

> The Rule of Necessity had its genesis at least five and a half centuries ago. Its earliest recorded invocation was in 1430, when it was held that the Chancellor of Oxford could act as judge of a case in which he was a party when there was no provision for appointment of another judge. *Y. B. Hil.* [Page 214] 8 Hen. VI, f. 19, pl. 6. Early cases in this country confirmed the vitality of the Rule.

The Rule of Necessity has been consistently applied in this country in both state and federal courts. In *State ex rel. Mitchell v. Sage Stores Co.*, 157 Kan. 622, 143 P.2d 652 (1943), the Supreme Court of Kansas observed:

> "[I]t is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty **if failure to do so would result in a denial of a litigant's constitutional right to have a question**, properly presented to such court, adjudicated." *Id.*, at 629, 143 P.2d, at 656. (Footnotes omitted).

Similarly, the Supreme Court of Pennsylvania held:

> "The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest – **where no provision is made for calling another in, or where no one else can take his place** – it is his duty to hear and decide, however disagreeable it may be." *Philadelphia v. Fox*, 64 Pa. 169, 185 (1870).

(Emphasis added).

The Arkansas Supreme Court has taken the same view in the past. In *Acme Brick Co. v. Missouri Pac. R.R.*, 307 Ark. 363, 369, 821 S.W.2d 7 (1991), the Court said:

> Although without expressly stating so, the trial court applied the rule of necessity as an exception to the Commissioners' disqualification. The rule of necessity, as stated in terms particularly applicable to administrative officers, is as follows:
>
> > Under the doctrine or rule of necessity, it has been held that administrative

> officers or bodies are not disqualified because of bias, prejudice, or prejudgment of the issues ***where they alone have the power and authority to act and where, if they are disqualified, action cannot otherwise be taken, particularly where a failure of justice would result if they are not permitted to act***. . . .
>
> The doctrine or rule of necessity has been held to apply ***only*** where the disqualification of the alleged prejudiced member or members of the tribunal **would destroy the tribunal itself, leaving no competent tribunal to function or to act.**

73 C.J.S. Public Administrative Law and Procedure 61(b) (1983).

[5] We have previously adopted the rule of necessity in *Wheatley v. Warren*, 232 Ark. 123, 128, 334 S.W.2d 880, 883 (1960), where we held that an exception to disqualification occurs "where the authority of the administrative officer is exclusive, and no legal provision for calling in a substitute is provided." Accordingly, we conclude that although the Commissioners' hearing this case created an appearance of bias that would ordinarily have required them to disqualify themselves from considering appellee's petition, the rule of necessity, as implicated by the absence of a procedure to appoint special Commissioners, excepted their disqualification. Thus, because there was no statutory procedure in place for the replacement of the Commissioners, it was necessary for them to hear appellee's petition and they did not commit reversible error by

> doing so. We note that **the absence of the procedure for appointment of special Commissioners is an area of the law which the legislature may choose to reconsider.**
>
> (Emphasis added).

Note that both the Arkansas and United States Supreme Courts have been very explicit in saying that the rule ***only*** applies where the failure to apply said rule would destroy the ability of the tribunal to function. There is no other basis for the application of said rule. In his dissent, Justice Brown suggests that the Arkansas Supreme Court "should also address the difference in the federal judiciary which has no mechanism for appointment of special judges. The Rule of Necessity obviously applies in federal judicial salary matters; however, our situation in Arkansas, where we do have an appointment process, is different."

**The Arkansas Supreme Court itself wrote the comment concerning judicial salaries, a misinterpretation of *United States v. Will***

The Arkansas Supreme Court suggests that there is a blanket rule allowing justices to stay in cases involving judicial salary. One might superficially read the comments to the rule concerning judicial disqualification and come to this erroneous conclusion. The comment, in pertinent part, found at *In the Matter of Ark. Code of Jud. Conduct*, 313 Ark. 735, 752 (1993) says:

> A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the

> question of disqualification, even if the judge believes there is no real basis for disqualification.
>
> By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

These are the Arkansas Supreme Court's own words. This statement is at best an oversimplification and misinterpretation of *United States v. Will*, and contrary to Arkansas caselaw as well.

*United States v. Will* involved a question of judicial salaries for all federal judges. All federal judges had the same ethical dilemma. They all had a personal stake in the litigation.

The pertinent fact was that there was no mechanism in the US Constitution allowing for the appointment of disinterested judges in such a case. In nearly every case, some other sitting federal judge would have no conflict and would be able to decide in case the regularly assigned judge had a conflict. For this one situation, there was a nationwide conflict of interest affecting all judges in substantially equal proportions. Yet there was no established method for obtaining disinterested and qualified persons for the decision of such a cause, because such matters arise so infrequently.

In *United States v. Will*, the Court said:

> Jurisdiction being clear, our next inquiry is whether 28 U.S.C. § 455 or traditional judicial canons operate to disqualify all United States judges, including the Justices of this Court, from deciding these issues. This threshold question reaches us with both the Government and the appellees in full agreement that § 455 did not require the District Judge, and does not now require each Justice of this Court, to disqualify himself. Rather, they agree the ancient Rule of Necessity prevails over the disqualification standards of § 455. Notwithstanding this concurrence of views resulting from the Government's concession, the sensitivity of the issues leads us to address the applicability of § 455 with the same degree of care and attention we would employ if the Government asserted that the District Court lacked jurisdiction or that § 455 mandates disqualification of all judges and Justices without exception.
>
> In federal courts generally, when an individual judge is disqualified from a particular case by reason of § 455, the disqualified judge simply steps aside and allows the normal administrative processes of the court to assign the case to another judge not disqualified. In the cases now before us, however, **all Article III judges have an interest in the outcome; assignment of a substitute District Judge was not possible.** And in this Court, when one or more Justices are recused but a statutory quorum of six Justices eligible to act remains available, see 28 U.S.C. § 1, the Court may continue to hear the case. Even if all Justices are disqualified in a particular case under § 455, 28 U.S.C. § 2109 authorizes

> the Chief Justice to remit a direct appeal to the Court of Appeals for final decision by judges not so disqualified.
>
> **However, in the highly unusual setting of these cases, even with the authority to assign other federal judges to sit temporarily under 28 U.S.C. §§ 291-296 (1976 ed. and Supp. III), it is not possible to convene a division of the Court of Appeals with judges who are not subject to the disqualification provisions of § 455. It was precisely considerations of this kind that gave rise to the Rule of Necessity,** a well-settled principle at common law that, as Pollack put it, "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise." F. Pollack, A First Book of Jurisprudence 270 (6th ed. 1929).
>
> (Emphasis added) (footnote omitted).

The Arkansas Supreme Court, in concluding that the Rule of Necessity always allows a judge or justice to sit on a case concerning their own salaries, is simply wrong. The power to sit on a case involving judicial salaries, including the salary of the sitting judge or justice, is present only when there is no established mechanism for appointing a disinterested judge or justice.

Likewise, in the present case, there is no reason that the Court cannot allow Arkansas Constitution Article 7, § 9 to provide special justices in this case. Article 9 provides:

> In case all or any of the judges of the Supreme Court shall be disqualified from presiding in any cause or causes the court or the disqualified judge shall certify the same to the Governor, who shall immediately commission the requisite number of men learned in the law to sit in the trial and determination of such causes.

It is plain that all sitting justices are disqualified under the rules. It is furthermore plain that there is a simple, speedy, and effective mechanism, often used under state law, to obtain impartial justices to decide this cause.

In a nearly identical situation some 77 years ago, all the sitting justices recused. In *Brickhouse v. Hill*, 167 Ark. 513, 527, 268 S.W. 865 (1925), In *Brickhouse v. Hill*, 167 Ark. 513, 268 S.W. 865 (1925),[2] the decision was rendered wholly by special justices. The reason? The Court had to consider a constitutional amendment dealing with judicial salaries. The same conflict is present in this case. Nothing has changed in the interim that would legally permit the sitting justices of the Arkansas Supreme Court to refuse to recuse and allow the Governor to appoint disinterested justices to hear all the entire case. Special Justice Arnold explained the reason for his participation in the case as follows:

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[2] An excellent article on *Brickhouse* may be found at *Tearing Down Brickhouse, Could Judicial Demolition of Brickhouse v. Hill Prompt a New Arkansas Constitution*? Arkansas Law Review, Volume 54 No. 1 page 19 (2001). Interestingly enough, *Brickhouse* involved a challenge to a constitutional amendment that had been written off as dead for over 4 years. Special justices declared the amendment passed. That Amendment is now known as Amendment 7 – the very amendment under which the people of Arkansas possess the right to change laws by initiative and referendum.

ARNOLD, Special Justice, (concurring). The Judges of the Supreme Court having certified to the Governor their disqualification to determine whether or not two certain proposed amendments to the Constitution of Arkansas, submitted by the joint and concurrent resolutions of both houses of the Legislature to the biennial election of 1924, were adopted, this court was appointed by the Governor, under authority of 9, art. 7, of the Constitution, to determine the two causes involving the proposed amendments, one of them coming by appeal from the circuit court and the other from the chancery court of Pulaski County.

One of the amendments, styled "Proposed Amendment No. 10," authorizes the Legislature to provide for two additional judges of the Supreme Court and fixes the salaries of the judges, until otherwise provided by law, at $7,500 per annum.

* * *

The regular court, in certifying its disqualification to try these cases, follows its decision in *Ferrell v. Keel*, 103 Ark. 96. Also see the decision of the special court appointed by the Governor involving the construction of a portion of Amendment No. 10, as it is called, in *Ferrell v. Keel*, 105 Ark. 380, but the digester of statutes has designated said amendment as No. 7.

*Ferrell v. Keel,* 103 Ark. 96 (1912) is another case where Arkansas Supreme Court justices recused from a case in which the validity of the appropriation for judicial salaries was challenged. In that case, not part but all of the judicial salary was at stake, yet the justices recused and allowed the case to be decided by special justices. Likewise, all sitting justices of the Arkansas Supreme

Court in the present case were duty bound to recuse, and to certify their disqualification to the governor for the appointment of special justices.

In his dissent, Justice Brown stated that his research had uncovered no case in which the Rule of Necessity had been sustained even where there is an established procedure for the appointment of special justices having no conflict. (Appendix page 24) Yet there are at least two cases in which all members of the Arkansas Supreme Court recused, on fact situations very similar to those in this case.

**The suggestion that the Governor suffers the same or a similar disqualification lacks basis in fact.**

The attempt by the sitting justices to raise a claim of disqualification of the governor is untenable. Not one true executive branch officer in the State of Arkansas earns as much as $100,000 per year. Officials of the executive branch of Arkansas government receive about $30,000 to $70,000 per year, the governor receiving a salary at the high end of that scale. For example, the elected Secretary of State gets $46,002.

Once again, Justice Brown's dissent points out the fallacy of the majority opinion, noting that the governor is not directly affected by the proposed initiative. Brown concludes "At this juncture, I am not convinced that the Governor has a conflict of interest comparable to this court. Certainly, special justices appointed by the governor would not have the conflict of interest that this court has." (Appendix pages 23-24)

## CONCLUSION

In this case, a state court of last resort has decided a question concerning the functioning of the judiciary in a manner contrary to the established precedents of that court and of this United States Supreme Court, and furthermore contrary to the best interests and reputation of the judiciary in general. Unless this Court grants the writ, Petitioners will have no opportunity for review of the decision of the Arkansas Supreme Court.

For the reasons set forth herein, Petitioners respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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## APPENDIX A – ARKANSAS SUPREME COURT DECISION DATED APRIL 10, 2002

### SUPREME COURT OF ARKANSAS

**No.** 02-284

| | |
|---|---|
| ROBERT WHITE, *et al.*,<br>APPELLANTS,<br>VS.<br>SHARON PRIEST, *et al.*,<br>APPELLEES, | A PETITION CAPTIONED AN ORIGINAL ACTION,<br><br>GRANTED IN PART AND DISMISSED IN PART; MOTION TO EXPEDITE GRANTED; MOTION SUGGESTING DISQUALIFICATION DENIED. |

On March 26, 2002, petitioner, Robert White, filed a petition captioned "An Original Action for Immediate Review and Such Other Relief to Which He May be Entitled under Amendment 7 to the Arkansas Constitution and its Implementing Act 877 of 1999 (codified at Ark. Code Ann. §§ 7-9-501 -507 (Repl. 2000)) and under Art. 16, § 13 of the Arkansas Constitution." In his petition, White names as respondents: all Supreme Court Justices, individually and in his or her official capacity; the Secretary of State, the Attorney General, and the State Treasurer, in their official capacities; the Department of Finance and Administration and Revenue Commissioners, in their official capacities; and named members of the State Board of Election Commissioners. In his petition, White sets out a number of counts which we consider in the order he presents them.

In his Count I, White requests this court to immediately review the Secretary of State's Declaration issued on February 27, 2002, whereby, after consulting with the Attorney General, she concluded the popular name and ballot title contained in an initiative petition submitted by White are fair and accurate and facially valid. That initiative petition contains a proposed amendment to cap the salaries and regulate benefits of all state officers and employees who are paid in whole or in part from state or local taxes and fees, fines, penalties, tuition, or rents of state and local property. The salaries would be limited to $100,000 and the fringe benefits could not exceed the amount of 25% of the "direct salary." Before the Secretary of State issued the Declaration, the Attorney General had delivered an opinion, approving the popular name and ballot title of White's proposed amendment. The Declaration and Attorney General's opinion are marked Exhibits 1 and 2, respectively. Significantly, the Attorney General added a caveat in his opinion concerning particular hazards attendant to lengthy and complex proposals, such as the one submitted. In doing so, the Attorney General pointed out that, with any proposed amendment of considerable length and complexity such as White's, the sponsor runs the risk of a challenge and a finding by the court that the ballot is unacceptable, either because it is too "complex, detailed, and lengthy," or because it has "serious omissions."

Pursuant to Ark. Code Ann. § 7-9-506, White seeks review of the Secretary of State's Declaration and requests a declaratory judgment, finding White's ballot title and popular name sufficient. We grant review and direct this court's clerk to establish an expedited and appropriate briefing schedule for all parties, including amici curiae

briefs, if any, permitted under Ark. Sup. Ct. R. 4-6. *See also Stilley v. Priest*, 341 Ark. 329, 16 S.W.3d 251 (2000).

Before leaving this count raised by White, we note his "motion for recusal" filed on March 28, 2002, wherein he requests the recusal of all supreme court justices. White asserts that, because of his proposed amendment limiting salaries and other benefits of public servants, including those of the justices, there is an appearance of bias on the part of the justices since they have a financial interest in this matter that requires our recusal. White asks us to direct the Governor to appoint disinterested judges who have no interest in higher taxes or high salaries for public servants, and who are not employed by the State or local government. White further claims each justice is a defendant from whom money damages are sought.

White's claim is rather unclear, but he seems to be suggesting that the justices could be liable for illegal exactions in the nature of salaries received that exceed caps or limitations under the amendment he proposes. In this respect, he generally requests injunctive relief as well.

White's claim is not only premature, it is also a claim for illegal exactions under Ark. Const. art. 16, § 13, and can only be commenced in a trial court; such a suit cannot be commenced in the appellate courts. *See Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988). White offers no brief, citation of authority, or argument to support his underlying argument for the justices' recusal, and we are unaware of any. Thus, this court is without original jurisdiction to hear any of the alleged claims for illegal exactions, and we dismiss Count 1.

Even if this court had original jurisdiction to initially consider a claim based on illegal exactions, the justices

still would be empowered and duty bound to consider and decide these issues White strives to raise. Under Ark. Code of Judicial Conduct Canon 3(E)(1), while a judge must disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, the "Rule of Necessity" may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute. *See* Commentary to Canon 3(E)(1); *see also* Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 20.2.2, at 591-592 (1996) (the Rule of Necessity is most likely to be invoked in situations where the filing of a suit whose resolution will directly affect the pecuniary well-being of judges as a whole, such as a suit seeking to increase judicial pay or retirement benefits); and Jeffery M. Shaman *et al.*, *Judicial Conduct and Ethics* § 4.03, at 111-112 (3d ed. 2000).

In addition, we point out that Ark. Const. art. 7, § 9, in pertinent part, provides that when all or any of the justices are disqualified, the Governor must immediately commission the requisite number of men (or women) learned in the law to sit in the trial or determination of the supreme court's cases. In other words, this court does not direct who the Governor commissions to perform his duties as a justice, like White suggests in his motion. More important, it is significant to mention that in the review White seeks here, the Governor would have the same or similar conflict White asserts the justices have, since there are countless employees in the executive branch of government that are paid salaries exceeding the $100,000 cap established under White's proposal. *See* Acts 4, 234, 1238, 1612, 1636, 1638, 1668, 1669 of 2001. Here, each justice,

individually, rejects White's motion to recuse under the "rule of necessity."

In his Count 2, White requests us to review the Secretary of State's Declaration issued on February 27, 2002, whereby, after consulting with the Attorney General, she declared the popular name and ballot title on White's Arkansas Prison System Amendment proposal to be fair and accurate and facially valid. As was the case in the "salary cap" proposal, the Attorney General's opinion issued on January 20, 2002, added a caveat that particular hazards exist because of the length and complexity of White's ballot title. We grant review, and as with the "salary cap" proposal, we direct the clerk to establish an appropriate briefing schedule for all parties, including amici curiae briefs authorized, if any, under Ark. Sup. Ct. R. 4-6.

In Count 3, White's petition asks this court to enroll as law the proposed Used Car Tax of 2000 which this court, in *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000), found insufficient because of the proposed amendment's misleading popular name and ballot title and because it conflicted with the Arkansas and United States Constitutions. As a part of our holding in *Kurrus*, we ordered that the Used Car Tax Amendment of 2000 not be placed on that year's General Election ballot, or alternatively, that any votes cast on that amendment not be counted.

Here, White merely raises the same arguments we thoroughly considered in *Kurrus*. Offering no new argument or citations, and totally ignoring the holding in *Kurrus*, White states the following:

> The [*Kurris*] Supreme Court based its order denying the validity of the amendment upon *two flagrantly unlawful considerations*:
>
> (1) That the ballot title was defective even though the ballot title plainly and certainly would have been sufficient if it had been approved by the General Assembly for an amendment proposed by same and
>
> (2) that the amendment violated a substantive provision of the Constitution of Arkansas. The court also *claimed* that the petition violated the United States Constitution, but this *claim* was so clearly baseless that the court could not cite a single federal case of any kind in support of its contention. (Our emphasis.)

White further reflects his disagreement with the *Kurrus* decision saying, "The Arkansas Supreme Court [in *Kurrus*] was wholly without jurisdiction to declare a ballot title defective based upon *its own created 'law'* which created an extremely harsh test for citizens' initiatives, while using a test for measures referred by the Arkansas General Assembly that is so lenient that nothing has ever failed the test." He adds (again without new argument) that "any attempt to strike an initiative petition upon a claimed possible illegality of the substantive provisions of the initiative before the vote is had, canvassed, and certified, is a *nullity*." (Our emphasis.)

White's present counsel, Oscar Stilley, is well aware that this court dealt with these two foregoing issues in *Kurrus*, and that Stilley also continued his argument in a petition for rehearing in that case. His arguments were rejected on both occasions. We also point out that, even before *Kurrus*, this court in *Thiel v. Priest*, 342 Ark. 292,

28 S.W.3d 296 (2000), stated very clearly the rationale behind why initiatives by the General Assembly and by the voters are constitutionally different and permissible. *See also Kurrus*, at 440.

It is not this court's duty to review issues it has already considered or decided when no good reason has been shown to do so. We are, once again, troubled by Mr. Stilley's unwillingness to recognize precedent and his attempt to breathe life into decisions he previously lost. *See Stilley v. Hubbs*, 344 Ark. 1, 40 S.W.3d 209 (2001). We are always ready to reconsider the court's prior precedents if proper argument demonstrates that reconsideration and review are needed. *See Shannon v. Wilson*, 329 Ark. 143, 151, 947 S.W.2d 349, 353 (1997). That is not the case at hand. Thus, as provided under Ark. R. App. P. – Civ. 11, we are compelled to order Mr. Stilley to show cause in writing why a sanction should not be imposed against him. Such writing shall be no later than seven days after the date of this opinion. The Attorney General and other state or constitutional parties Mr. Stilley named in this matter may have four days to respond from the date Stilley files his writing. *Id.* With regard to the bare and untimely allegations White attempts to assert in Count 3 of his petition, we dismiss that count in toto because those allegations, as explained above, have been previously decided by this court.

Before leaving the Count 3 matter, we note White's mention that this court is not at liberty to fault the work (opinion) of the Attorney General after the Attorney General had approved the proper name and ballot title of the Used Car Tax of 2000, but White cites no authority to support his contention. The authority, of course, is wholly contrary to such an assertion. *See Arkansas Prof'l Bail*

*Bondsman Lic. Bd. v. Oudin*, 348 Ark. ___, ___ S.W.3d ___ (March 21, 2002); *Bailey v. McCuen*, 318 Ark. 227, 884 S.W.2d 938 (1994); *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990). Also, we note White's reference in Count 3 to his theory that, since the Used Car Tax amendment should have been enrolled by the Secretary of State in 2000, the State Finance & Administration (contrary to the text of the 2000 proposal) collected illegal taxes. White claims he and other taxpayers should be entitled to refunds from these illegal exactions. Again, even if Count 3 stated a viable cause of action, that alleged illegal exaction claim would have been required to be commenced in trial court under Ark. Const. art. 16, § 13. *See Franz*, 296 Ark. 181, 754 S.W.2d 839. This court has no original jurisdiction to decide the matter, and we dismiss it.

In White's Count 4, he again questions the *Kurrus* decision, but limits this part of his argument to say that this court erred in invalidating the Used Car Tax of 2000 on the basis of constitutional provisions of the State and U. S. Constitutions which prohibit the impairment of contracts. Of course, this court indeed held that the proposed amendment violated such constitutional prohibitions, even though three justices did register different views on this issue. White expands his allegations in Count 3 to point out that, if his theory is correct that Ark. Const. amend. 43 cannot supersede provisions of Ark. Const. amend. 9, then any compensation the supreme court justices here received that exceeded their starting salaries would constitute

illegal exactions.[1] In turn, White uses this theory as the basis to ask all justices to recuse, alleging they have a pecuniary interest involved. As we have already stated, any illegal exaction action must be commenced in trial court, and we have no original jurisdiction over this matter. Therefore, we dismiss it. But as we have explained above, the "rule of necessity" compels that we not recuse in this case even if this court had original jurisdiction to decide this matter. *See* Commentary to Canon 3(E)(1).

Next, White requests in his Count 5 that "this court enjoin and prohibit all defendants from the use of any standard more restrictive that the 'manifest fraud' standard used for General Assembly ballot titles." Once again, this allegation and prayer for relief was considered in the *Thiel* and *Kurrus* cases. Thus, we dismiss this claim for the reasons already discussed above.

In Count 6, White's allegations are particularly confusing, but he refers to an Attorney General Opinion No. 2001-391, marked "exhibit 6," which, among other things, sets out the popular name and ballot title of a proposed amendment that would abolish all ad valorem taxes

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[1] White cites Ark. Const. amend. 9, § 2 for the proposition that the amendment prohibits supreme court justices from receiving compensation greater than that authorized at the beginning of the term to which the judge was elected. He then refers to Amendment 43 which he says permits the increase of salaries of justices of the supreme court during the term for which the justice has been elected. White concludes that, if *Kurrus* is the law, then Amendment 43 is plainly and facially unconstitutional as violating or conflicting with an existing substantive provision of the Arkansas Constitution. Of course, Amendments 9 and 43 are not in issue here, but we would merely observe at this point that the Publishers Notes to Amendment 43 suggest Amendment 43 probably supersedes Amendment 9.

on personal property. The Attorney General's opinion, dated January 11, 2002, rejected the popular name and ballot title due to ambiguities in the "text" of the proposed measure. The Attorney General instructed Mr. Stilley to "redesign" the proposed measure and ballot title and resubmit it. Apparently, Stilley did not do so. Also, it appears the proposal with ballot and popular name was not sent to the Secretary of State for Declaration, as is provided under Act 877 of 1999. *See* Ark. Const. amend. 7, Ark. Code Ann. §§ 7-9-505 and 7-9-107(d) and (e)(B)(2) (If the Attorney General or Secretary of State refuse to act or if the sponsors feel aggrieved by his acts, in such premises, the sponsors may, by petition, apply to the supreme court for proper relief.). Because the Secretary of State has not determined the sufficiency of this ad valorem tax proposal, this court has no jurisdiction to consider this matter and, therefore, we dismiss this count in White's petition.

In Count 7, White submits for review another proposed measure which is an amendment to abolish taxes on used goods. As was the situation with the ad valorem tax prohibition in Count 6 above, the Attorney General rejected Mr. Stilley's request to resubmit his proposal, which the Attorney General rejected as ambiguous. The Secretary of State has not made her determination as to sufficiency or issued a Declaration. We dismiss this count, since we do not have jurisdiction to review it for the reasons stated in dismissing Count 6.

In conclusion, White submits a Count 10 (*sic*) which lists nine paragraphs under the caption, "Petition Sponsors Have the Right to Cure, Including Cure of the Language of

the Ballot Title and Popular Name."[2] Six of the paragraphs include what only can be described as general legal principles that White claims to be true, without providing the court with citations of authority or argument. For example, after White proceeds by saying he incorporates all general allegations in the other counts, he states the following:

> 100. The legitimate interest of the state in the regulation of speech in the form of ballot titles, namely the prevention of fraud however denominated, is not advanced by the refusal to permit improvements, corrections, or changes to ballot titles, popular names, or the text of the measure, as to matters which do not affect the general meaning and purpose of the amendment, after suit is filed by a challenger.
>
> 101. To the extent that the state has an interest extending beyond fraud prevention, to the provision of greater detail, accuracy, completeness, or concision to the voters, that interest is best protected by a modification of the language of the ballot title, popular name, or text of the measure, as to matters that do not materially alter the purpose and effect of the measure, rather than the striking of the ballot title and popular name. This would be the alternative least restrictive of free speech rights and thus meeting constitutional muster for restrictions on core political speech.

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[2] White sets out Counts 1 through 7, omits stating Counts 8 and 9, but continues with Count 10, which apparently should be numbered Count 8.

102. Ballot titles and popular names are core political speech.

103. The text of citizen initiated measures is core political speech.

104. The ballot titles and popular names of all statewide initiatives are approved by the Arkansas Attorney General. In some cases the ballot title is a ballot title substituted by the Attorney General. The Arkansas Supreme Court is not at liberty to fault the work of the Attorney General, a member of the Executive Branch, and therefore to punish the sponsor of any amendment or the electorate, by removing the amendment on the basis of a supposed error by the Attorney General.

105. Alternatively, the Attorney General, in issuing an opinion, becomes a guarantor of the ballot title and popular name, and thus any subsequent striking of the amendment renders the officers of the State of Arkansas liable for any damages to the sponsors or the taxpayers for the failure to properly certify the rectitude of the ballot title and the matter which it describes, thus rendering the officers of the state, and especially the Treasurer of the State, Commissioner of Revenues, and Director of the Department of Finance and Administration liable to repay all damages suffered by the sponsor or by taxpayers as a result of the defective ballot title opinion.

At the end of his Count 10, White *demands* an oral argument.

After reading the foregoing list, we can only conclude no further consideration and reflection is needed on this court's part other than the issues we already decided in

Counts 1 through 7, except to say this court will later consider granting an oral argument when a timely request is made under Ark. Sup. Ct. R. 5-1(a), and this court decides the request meets the requirements of that rule.

In sum, this court grants review of White's Counts 1 and 2, and dismisses his Counts 3, 4, 5, 6, and 7. An expedited briefing schedule shall be made regarding the counts granted and on review. The court issues a show-cause order for White's counsel, Oscar Stilley, to show in writing why a sanction under Rule 11 should not be imposed against him.

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## APPENDIX B – ARKANSAS SUPREME COURT DECISION DATED MAY 22, 2002 – SUPPLEMENTAL OPINION ON RECUSAL

SUPREME COURT OF ARKANSAS

No. 02-284

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| ROBERT WHITE,<br>PETITIONER,<br>VS.<br>SHARON PRIEST, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, AND MARK PRYOR, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF ARKANSAS,<br>RESPONDENTS, | Opinion Delivered<br>SUPPLEMENTAL OPINION ON RECUSAL. |

ROBERT L. BROWN, Associate Justice

On Friday, May 17, 2002, I issued an opinion in which I recused from sitting on the proposed constitutional amendment and Ballot Title which would cap the salaries of officers and employees of the state government at $100,000. My reason for doing so was that should the amendment pass, it would have a direct financial impact on me as it would reduce my salary by about twenty percent. I further disagreed with the majority that the Governor of the State has a comparable conflict of interest to mine and is foreclosed from making an appointment for a special justice in this case. My sole reason for recusal

was my financial interest in the subject matter of the Ballot Title.

Mr. White has also proposed a second unrelated constitutional amendment and Ballot Title dealing with the State's penitentiary system under the same case number. It was not my intention to recuse on this discrete matter because it involved an entirely different proposed constitutional amendment.

However, there has been no motion to sever the two proposed constitutional amendments and treat them as different cases. Nor has the court decided that it will do so on its own motion. The net result of this is that because the two proposed constitutional amendments will be considered by the court at one time as one case, I must also recuse from participation in the proposed constitutional amendment that deals with the State's penitentiary system.

As I stated last week, our State Constitution provides that a justice shall not sit in a matter in which he or she is "interested." Ark. Const. amend. 80, § 12. It further provides that in the event of such disqualification, the Chief Justice shall request that the Governor of the State appoint a special justice to sit on the case involved. Ark. Const. amend. 80 § 13.

I therefore request the Chief Justice pursuant to Amend. 80, section 13 of the State Constitution of Arkansas to appoint a special justice to sit for me in this case to decide the sufficiency of both the proposed salary-cap amendment and the proposed penitentiary amendment.

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## APPENDIX C – ARKANSAS SUPREME COURT DECISION DATED MAY 17, 2002 – DENIAL OF REHEARING

**SUPREME COURT OF ARKANSAS**

No. 02-284

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| ROBERT WHITE,<br>PETITIONER,<br>VS.<br>SHARON PRIEST, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, AND MARK PRYOR, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF ARKANSAS,<br>RESPONDENTS, | **Opinion Delivered**<br>5-17-02<br><br>ORDER ENTERED STRIKING BRIEF. |

Mr. Oscar Stilley has filed a petition for an original action wherein he asserts seven counts for relief. On April 10, 2002, this court granted his counts one and two, and denied the remaining counts. He had requested disqualification of all justices to recuse from hearing his petition because, he argues, they have demonstrated a hostility towards him and because the justices have an interest in the outcome in the case.

Mr. Stilley's arguments deal primarily with his belief that, over a ten-year period, this court ruled against him in five cases. He offers no other allegations bearing on any

hostility issue, but seeks to "interrogate" the present justices "eyeball-to-eyeball" at a hearing in a discovery fashion in an attempt to find reasons why the court is hostile towards him. Instead of alleging reasons for the justices' recusing, he merely suggests he wants a hearing to "ferret out the facts" pertinent to disqualifications. Mr. Stilley also asserts the sitting justices have a pecuniary interest in this case because one of the ballot-title issues concerns a proposed amendment that could "cap" their salaries, if the proposed amendment is adopted. On April 10, 2002, this court granted Mr. Stilley's request to review that ballot title and proposed amendment.

Mr. Stilley presents no valid reasons or allegations that warrant a justice's recusal in this case. The only reason Mr. Stilley offers to show the court's hostility towards him is that he lost five prior cases before this court that he claims he should have won. Fourteen different justices served on this court during the ten-year period in which those five cases were decided. This argument is yet another disingenuous way to again show his dissatisfaction concerning earlier opinions of this court with which he disagrees. Such re-visits of earlier cases offer *nothing new* showing that the precedential value of those opinions should be reversed. In fact, Stilley's pleadings, motion, and argument constitute a clear violation of Ark. R. App. P. – Civ. 11. In this same vein, this court, on prior occasions, has expressed its displeasure with attorneys who have directed disrespectful language towards courts and judges. *See McLemore v. Elliott*, 272 Ark. 306, 614 S.W.2d 226 (1981) (striking appellant's brief due to "intemperate and distasteful language" directed toward trial judge, pursuant to former Ark. Sup. Ct. R. 6); *see also* Ark. Sup. Ct. R. 1-5 (captioned "Contempt," it provides, "No argument, brief, or

motion filed or made in the Court shall contain language showing disrespect for the trial court"). In view of Mr. Stilley's continued strident, disrespectful language used in his pleadings, motions, and arguments, and his repeated refusal to recognize and adhere to precedent, Mr. Stilley's 70-page brief should be stricken entirely.

Examples of Mr. Stilley's remarks follow:

> It is also all too possible that the Court will simply decline to rule consistently, upholding *Kurrus* when that is convenient, blithely ignoring *Kurrus* when consistency of decision making will not bring the desired result.
>
> * * *
>
> Therefore, it appears that the only persons in this Act receiving more than $100,000 per year are judicial officers. Why then did the Court falsely claim that this Act supported their theory that many executive branch employees get over $100,000.
>
> * * *
>
> The Court's action in pretending to raise a claimed conflict on the part of the Governor, on such flimsy grounds, indicates a fear on the part of the justices that an impartial tribunal will decide the case honestly but contrary to the way that this Court would decide the case.
>
> * * *
>
> It grieves undersigned counsel to be forced to recount part of the many serious and apparently intentional wrongs that the members of this Court has [*sic*] committed, as part of their claim for recusal. However, by refusing to honestly consider a fair claim for disqualification, made as

gently as possible, the Court puts undersigned counsel in the position of having to raise these issues to protect his rights and the rights of his clients.

* * *

The Court simply left its decision intact even though its reasoning is wholly irreconcilable with prior decisions of the Court. This leaves two possibilities. One, the court, in its original opinion intentionally lied about the citation of these authorities. These authorities do in fact annihilate the Court's reasoning and ruling on the parol evidence question in this case. If this is the basis for the oversight, the Court and each of its members necessarily demonstrate rank prejudice against Appellant and should recuse.

* * *

The other possibility is that the Court accidentally overlooked these authorities, although they were cited and included in the lists of authorities, and although these cases were discussed at length at pages 2-4 of the Appellant's reply brief. If this is the problem, Appellant wishes to hear the reason, if any, that Appellant should be expected to trust the competence of the Court in the decision of this cause.

* * *

By this means, any reader of this motion may examine Exhibit "1," and compare same to the opinion in *Roberts v. Priest*, and thus know that the *Roberts* Court wilfully and knowingly ignored the principal argument of the Intervenors, because the argument was irrefutable.

* * *

The decision of the Court, coupled with the Court's history of refusing to correct blatant and manifest error upon request for rehearing, requires that undersigned counsel make this fact known to the public. Publicity is the cure for government evils. Most certainly, a refusal to acknowledge and adjudicate arguments, solely because they provide irrefutable proof in favor of a position disliked by the Court, is a government evil that must be stamped out.

* * *

It seems the Court knew in advance that its ruling would not withstand any critical analysis, and wished to stifle any pleading that would expose the weakness of the Court's opinion.

* * *

This simply shows that the Court reacts in anger to despised arguments by undersigned counsel that it cannot logically refute. This behavior is exactly the sort for which the bench and bar have fallen into great disfavor and distrust with the general public in Arkansas.

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What is required, in other words, is a return to *stare decisis*, and adherence to established legal rules even when the judge or justice prefers a result different from that required by the law. This conduct has not stopped. Rather it has intensified.

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The list of cases in which the Court has acted prejudicially to undersigned counsel is by no means complete. On the contrary, this is the tip of the iceberg. This Court has repeatedly shown that it will declare the law one way on

> undersigned counsel's cases, and the opposite on cases by other individuals.
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> We cite the foregoing examples of the general tone of disrespect for the code of ethics and Mr. Stilley's breach of his oath of office as an attorney-at-law. That disrespect for the court pervades Mr. Stilley's brief. As was the situation in *McLemore*, we examined Mr. Stilley's brief to see if we could strike only some parts, but find Mr. Stilley's intemperate and distasteful language spread throughout all of his brief. Mr. Stilley asked to incorporate his brief as part of his petition. We conclude that Mr. Stilley's brief is an inexcusable breach of the obligation of professional conduct that this court expects of the members of the bar. Accordingly, we direct that all copies of his brief shall be stricken in their entirety from the files of this court.

Because this matter implicates a breach of the Model Rules of Professional Conduct, we refer Mr. Stilley to the Professional Conduct Committee and request the Committee to take whatever action it believes his actions warrant under the Model Rules of Professional Conduct.

BROWN, J., concurs in part and dissents in part.

ROBERT L. BROWN, Justice, concurring in part and dissenting in part. I agree with much of the majority's opinion. However, I have decided to recuse on one of the two ballot-title matters that remain before this court to be decided. The case on which I am recusing involves a constitutional amendment to reduce the salaries of state officers and employees. If passed, it would mean a reduction of the salaries of Supreme Court Justices by almost twenty percent.

On the issues not related to recusal, I agree that Mr. Stilley is attempting to resuscitate an issue long since laid to rest in *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000), and that he has not shown sufficient reason why he should not be sanctioned for this conduct under Arkansas Rule of Appellate Procedure – Civil 11. I also agree that he is not entitled to a fact-finding hearing under Appellate Rule 11. I further agree that an Appellate Rule 11 sanction of striking *most* of his brief is warranted because Mr. Stilley has filed a frivolous matter in this court. I would not, however, strike that portion of Mr. Stilley's brief which suggests recusal of this court's members due to a financial interest in the subject matter. Finally, I agree that this court lacked original jurisdiction to hear his illegal exaction cause of action brought against the members of this court. We appropriately dismissed that claim.

On recusal, Mr. Stilley has requested a declaratory judgment from this court on his proposed Ballot Title and Popular Name concerning a proposed amendment to cap the salaries of all state officers and employees at $100,000 and fringe benefits at 25% of that salary. The Ballot Title and Popular Name have been approved by both the Secretary of State and the Attorney General, as required by Ark. Code. Ann. § 7-9-501 to -506 (Repl. 2000). That issue has not been dismissed by this court. It is still viable and awaits this court's decision.

I first believe that while Mr. Stilley is not entitled to a fact-finding hearing regarding recusal of the members of this court under Appellate Rule 11, he is entitled to five minutes to argue his renewed motion that the members of this court recuse due to a financial interest in the subject matter of the proposed amendment. An opportunity to be heard on this matter is fundamental due process. We

routinely allow movants five minutes to argue any motions prior to oral arguments at our Thursday sessions of court. We allowed Mr. Stilley the same privilege in September 2001 to argue that this court should recuse in a different matter. *Stilley v. James*, 346 Ark. 28, 53 S.W.3d 524 (2001) (*per curiam*). I would similarly grant him five minutes to be heard on this recusal motion on the Ballot Title issue involving capping our salaries.

Secondly, Mr. Stilley, in his renewed motion for recusal, counters this court's first opinion in *White v. Priest*, ___ Ark. ___, ___ S.W.3d ___ (April 10, 2002), by pointing to the fact that the Governor of this state, who is authorized to appoint special justices under the State Constitution following recusal, does not have a direct conflict of interest in this matter because he makes less than $100,000. Thus, the argument goes, the Governor is not suffering under the same disability as the members of this court, and the Rule of Necessity, which requires otherwise disqualified judges to sit when there is no replacement judge available, does not apply. Simply stated his argument is: Because the Governor is not directly affected by the proposed initiative, but only certain employees of the Executive Branch are, the Governor does not suffer from a disabling conflict of interest, comparable to the members of this court, which prevents him from appointing special justices to replace us. Again, I believe that Mr. Stilley should have the opportunity to argue this issue before this court. In today's opinion, the majority addresses Mr. Stilley's Rule of Necessity argument in a footnote and refers to other state officers and employees who make over $100,000 a year. At this juncture, I am not convinced that the Governor has a conflict of interest comparable to that of this court. Certainly, special justices

appointed by the Governor and sitting on this case would not have the conflict of interest that this court has. The majority should also address the difference in the federal judiciary which has no mechanism for appointment of special judges. The Rule of Necessity obviously applies in federal judicial salary matters; however, our situation in Arkansas, where we do have an appointment process, is different.

Amendment 80, which recently amended our State Constitution with a new Judicial Article, reads:

> No Justice or Judge shall preside or participate in any case in which he or she might be interested in the outcome, in which any party is related to him or her by consanguinity or affinity within such degree as prescribed by law, or in which he or she may have been counsel or have presided in any inferior court.

Ark. Const. Amend. 80 § 12. The following section provides for appointment of special justices by the Governor of the State when a justice of our court disqualifies. Ark. Const. Amend. 80 § 13(A). My research has developed no case where the Rule of Necessity has been applied when a process exists for the appointment of a special judge to sit for the disqualifying judge. It occurs to me that the Rule of Necessity would only come into play if the Governor determined he had a conflict and could not appoint special justices.

Recusal is a matter left largely to the discretion of the individual judge. *SEECO, Inc. v. Hales*, 341 Ark. 972, 22 S.W.3d 157 (2000); *U.S. Term Limits, Inc. v. Hill*, 315 Ark. 685, 870 S.W.2d 383 (1994) (motion to recuse denied). I therefore recuse and will not participate in the Ballot Title

issue on capping the salaries of all government employees at $100,000. My reason for recusal is solely based on my financial interest in the subject matter of the proposed amendment and is not due to any other reason raised by Mr. Stilley. I request Chief Justice Arnold to request that the Governor appoint a special justice as my replacement for this Ballot Title issue only.

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